

## Emerging challenges in applying the Australian Consumer Law in e-commerce

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## Contents

- page 118 **General Editor's note**  
*John Swinson KING & WOOD MALLESONS*
- page 119 **Special feature**  
**Emerging challenges in applying the Australian Consumer Law in e-commerce**  
*Francina Cantatore BOND UNIVERSITY and CRONIN LITIGATION LAWYERS*
- page 125 **One does not simply make a meme: memes and intellectual property issues**  
*Anna Spies 5 WENTWORTH CHAMBERS*
- page 129 **What Queensland Government Information Technology Contracting (GITC) users need to know about the new GITC documents**  
*Kathryn Purcell-Hennessy KING & WOOD MALLESONS*
- page 134 **Driverless road vehicles in Australia — Part 1 — National Transport Commission discussion paper**  
*Terence Wong HWL EBSWORTH LAWYERS*

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## General Editor's note

*John Swinson* KING & WOOD MALLESONS

Welcome to this month's edition of the *Australian Media, Technology and Communications Law Bulletin*. In this month's edition our expert panel of authors looks at a range of issues including the following:

- In a special feature-length article, **Francina Cantatore** (Bond University and Cronin Litigation Lawyers) considers the dangers inherent to consumers in entering into transactions online, and the difficulties faced in applying consumer protection laws to such transactions.
- The creation of internet memes is an online trend which commonly involves adding a humorous caption to a photograph, other artistic work or still image from a film. Barrister **Anna Spies** (5 Wentworth Chambers), considers legal issues arising from the generation of internet memes under areas of law such as copyright, moral rights, trade marks, misleading and deceptive conduct and passing off.
- **Kathryn Purcell-Hennessy** (King & Wood Mallesons) outlines the changes proposed to the standard documents for doing information and communications technology (ICT) business with the Queensland Government from 2017, along with the uncertainties and risks associated with these changes.

- Earlier this year, the National Transport Commission (NTC) released a discussion paper entitled *Regulatory Options for Automated Vehicles*<sup>1</sup> which reviewed Australian road, vehicle design and safety laws and Regulations to determine their readiness for driverless vehicles. In the first of a series of two articles, **Terence Wong** provides an overview of the key issues identified by the NTC in that paper.



**John Swinson**  
General Editor  
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### Footnotes

1. National Transport Commission *Regulatory Options for Automated Vehicles* Discussion Paper (2016) [www.ntc.gov.au/Media/Reports/\(049B1ED1-5761-44D5-9E3C-814A9195285D\).pdf](http://www.ntc.gov.au/Media/Reports/(049B1ED1-5761-44D5-9E3C-814A9195285D).pdf).

## Special feature

# Emerging challenges in applying the Australian Consumer Law in e-commerce

*Francina Cantatore BOND UNIVERSITY and CRONIN LITIGATION LAWYERS*

### Introduction: a digital marketplace

Following the rapid evolution of the internet as a forum for marketing and transacting in recent years, a number of challenges have emerged. An inherent danger in this online trading marketplace is that consumers are increasingly exposed to unethical and misleading marketing strategies. A 2014 government report noted that Australian online shopping expenditure increased by 17.6% from 2011 to 2014 and is projected to reach \$26.9 billion by 2016.<sup>1</sup> While the changing business environment has notably benefited Australian enterprises, there has been a lack of focus by the business sector on creating consumer trust in e-commerce. Moreover, many businesses are guilty of flagrant breaches of the Australian Consumer Law<sup>2</sup> (ACL) in their activities on websites and in social media. Consequently, the ways in which companies advertise and sell their products on the internet, and the kinds of promises and claims that accompany online marketing, are continuously being scrutinised by the Australian Competition and Consumer Commission (ACCC) and have been addressed in a number of court decisions.<sup>3</sup>

Having an internet presence has become essential for most brick-and-mortar businesses, and social media in particular has transitioned from being a tool for personal communication to a platform for commercial enterprise. For example, in relation to social media usage, statistics show that there were 13.8 million Australian Facebook users in January 2015, indicating the pervasive reach of social media communications. This article addresses the challenges faced for businesses and consumers in the digital space — including websites and social media sites — by specifically focusing on two of the most salient provisions of the ACL, namely ss 18 and 29, and will consider recent breaches and case law in these areas.

### Misleading and deceptive conduct under the ACL: relevant provisions

In Australia, the ACL applies to all dealings between businesses and Australian consumers (except in relation to financial services), irrespective of the physical location of the business, as long as the business is a body corporate incorporated within Australia or carrying on business in Australia. The ACL includes prohibitions against misleading and deceptive conduct, unconscionable conduct and unfair contract terms. More specifically, s 18 prohibits misleading and deceptive conduct and s 29 prohibits false or misleading representations about goods or services. These provisions read as follows:

#### 18 Misleading or deceptive conduct

- (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

#### 29 False or misleading representations about goods or services

- (1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:
- (a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or
  - (b) make a false or misleading representation that services are of a particular standard, quality, value, or grade; or
  - ...
  - (e) make a false or misleading representation that purports to be a testimonial by any person relating to goods or services; or
  - ...
  - (g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or

- ...
- (i) make a false or misleading representation with respect to the price of goods or services; or
- ...
- (k) make a false or misleading representation concerning the place of origin of goods.

Certain sectors of the market have shown more susceptibility to misleading and deceptive behaviour. One area which has been scrutinised more heavily in recent years is where companies trade as online group buying websites, offering consumers discounts on goods and services.

### Online group buying sites

Online group buying websites are often referred to as “daily deals” or “deal of the day” sites, and sell vouchers for heavily discounted goods or services online. The ACCC has taken action against a few operators where misleading claims or promises were made to consumers.

The most recent case was against LivingSocial Pty Ltd (LivingSocial) (previously called Jump On It),<sup>4</sup> in which the company was charged with breaching ss 18, 29 and 23 of the ACL. The ACCC alleged that LivingSocial had engaged in misleading and deceptive conduct and made false representations on its website about consumers’ refund rights and the price of certain deals. LivingSocial acknowledged that the representations may have contravened the ACL and gave an undertaking to do a number of things, which included making changes to its website, making refunds to some of their customers and sending out corrective notices.<sup>5</sup>

In December 2013, the Federal Court of Australia ordered another online trader, Scoopon Pty Ltd (Scoopon), to pay penalties of \$1 million<sup>6</sup> for making false or misleading representations to consumers about their refund rights, and the price of goods advertised in relation to some of its deals and to businesses that there was no cost or risk involved in running a deal with Scoopon, when this was not the case.<sup>7</sup> The ACCC also instituted proceedings in 2014 against Spreets Pty Ltd (Spreets) for misleading and deceptive conduct and for making false or misleading representations.<sup>8</sup> In particular, while negotiating a “breakfast for two” offer in 2011, Spreets allegedly told a restaurant that only two or three tables needed to be allocated on Fridays. However, Spreets sold the deal to more than 250 consumers, without informing them of the limitation. Another allegation against Spreets was that it failed to disclose additional fees for skydiving deals. The Federal Court of Australia found the company had made false or misleading claims about the price of some deals, how readily customers could redeem vouchers, and their rights to a refund, imposing a fine of \$600,000 on Spreets.<sup>9</sup>

### Health products and services

The ACCC has also long maintained a particular focus on representations about health products and services. In *Australian Competition and Consumer Commission v Purple Harmony Plates Pty Ltd*,<sup>10</sup> the company had made certain representations on its website and in certain publications about a product called “Purple Harmony plates” suggesting the product had certain performance characteristics. It was alleged that the product had several therapeutic benefits, including:<sup>11</sup>

- decreasing stress levels;
- an ability to negate the effects of electromagnetic radiation;
- accelerate healing and strengthen the immune system; and
- treating cuts, burns, aches and pains.

The ACCC relied upon s 51A of the Trade Practices Act 1974 (Cth) (TPA),<sup>12</sup> and argued that the representations were as to future matters that could not be substantiated,<sup>13</sup> and that certain allegations were misleading or deceptive or likely to mislead or deceive,<sup>14</sup> contrary to ss 52 and 53(c) of the TPA.<sup>15</sup> The Federal Court of Appeals held that:<sup>16</sup>

- the defendant had represented that the products possessed the performance characteristics claimed;
- these representations made claims as to future matters; and
- the representations claimed that a person who purchased the product would derive the stated benefits from the product.

As the defendant did not provide any substantial evidence to support the company’s assertions,<sup>17</sup> the representations were found to be misleading.<sup>18</sup> The court ordered injunctive relief against the respondents making these representations and ordered refunds to customers and corrective advertisement.<sup>19</sup>

In the 2014 case *Australian Competition and Consumer Commission (ACCC) v Homeopathy Plus! Australia Pty Ltd*,<sup>20</sup> the Federal Court of Australia considered the implications of posting false or misleading articles on a website. Homeopathy Plus! Australia Pty Ltd uploaded three articles relating to homeopathic products on their website, which were accessible to all internet users.<sup>21</sup> The three articles contained a number of allegations to the effect that the whooping cough vaccine was largely ineffective and outdated. The court held these representations amounted to contraventions of ss 18 and 29 of the ACL.<sup>22</sup> Despite a separate disclaimer that the information on the website was “for educational purposes only” as well as a disclaimer in the terms and conditions of the website, Perry J held that these



disclaimers were not sufficient to “erase the false, misleading or deceptive nature of the information”<sup>23</sup> contained within the articles. This approach signified a strict application of the ACL provisions by the court, despite the inclusion of multiple disclaimers on a website.

## Emerging issues in e-commerce

### *Publication by information carriers*

Where information is published by carriers of information such as search engines like Google, the courts have considered the questions of who can be seen as making the representation and what is their responsibility for representations made on websites or social media sites?

On the facts of the landmark case *Google Inc v Australian Competition and Consumer Commission (ACCC)*,<sup>24</sup> the High Court held that sponsored advertisements appearing on the Google search engine were not representations made by Google. This decision followed from proceedings brought by the ACCC against Google in 2007 under s 52 of the TPA (now s 18 of the ACL). The ACCC alleged that Google had engaged in misleading or deceptive conduct by publishing certain advertisements, being the “sponsored links”.<sup>25</sup> In finding in favour of Google, the High Court determined that reasonable members of the public would have understood the sponsored links to be advertisements made and paid for by the advertisers, and that Google had not adopted the representations made in them.<sup>26</sup>

The court reasoned that:

... the display of sponsored links ... can be described as Google’s response to a user’s request for information does not render Google the maker, author, creator or originator of the information in a sponsored link.<sup>27</sup>

In coming to this conclusion, the court applied the 1985 judgment in *Yorke v Lucas*,<sup>28</sup> in which it had been noted that where information was merely passed on “for what it is worth”, and the party doing so expressly or impliedly disclaimed any belief in the truth or falsity of the information, that party could not be said to have engaged in misleading or deceptive conduct.<sup>29</sup>

Limited defences are available under the ACL and currently there is no reported judgment on the use of the “publisher’s defence” (s 251 of the ACL) or the “information provider’s exemption” (s 19 of the ACL) in relation to the internet or social media. Broadly speaking, the s 251 defence applies to publishers of advertisements where it is shown that the publisher is in the business of publishing or arranging for the publication of advertisements and that it received the relevant advertisement for publication in the ordinary course of business and did not know, and had no reason to suspect, that its publication would amount to misleading conduct.

Section 19 exempts “information providers” — in effect, the news media — from falling within the scope of the misleading conduct provisions of the ACL when they publish or broadcast items of news or comment.

### *Third party posts and online comments*

Emerging issues have arisen in this area of media law in respect of:

- the liability of owners of a Facebook page or website for postings on their web page — will the owner of the web page be responsible for misleading posts on their page by third parties?; and
- online comments where an opinion is expressed — when is a comment made online misleading or deceptive and when is it merely an expression of opinion of the writer?

#### *Third party postings*

In the 2011 decision *Australian Competition and Consumer Commission (ACCC) v Allergy Pathway Pty Ltd (No 2)*,<sup>30</sup> the truthfulness of testimonials posted on Allergy Pathway Pty Ltd’s (Allergy Pathway) web pages, which made representations about Allergy Pathway’s ability to cure allergies, were in issue. Previously, in 2009,<sup>31</sup> the Federal Court had found that statements made by Allergy Pathway on social media amounted to “conduct” under the ACL and had held that the representations were misleading and deceptive. Allergy Pathway had been required to publish corrective notices, and undertake not to engage in similar behaviour for 3 years.

However, subsequent to the 2009 judgment, testimonials were posted on the company’s Twitter and Facebook pages endorsing the company’s products — one statement in particular asserted that Allergy Pathway could “cure or eliminate virtually all allergies or allergic reactions”<sup>32</sup> and that it was safe for people to have contact with their allergens after treatments, when in fact it was not. The court confirmed that third party posts amounted to a breach of the undertaking and found the directors guilty of contempt of court, as they knew about the statements but did not remove them.

Notably, the court did not stipulate what a reasonable time frame by which third party comments ought to be removed would be, and this issue has not yet been addressed by the courts. However, there are now clear guidelines of expectations by the ACCC, set out on their website.<sup>33</sup> Essentially the amount of time a business needs to spend on monitoring its social media pages depends on two key factors:<sup>34</sup>

- the size of the company; and
- the number of fans or followers it has.

The more significant the company's resources and the greater the number of consumers reached, the more vigilance is needed.

#### *Information or opinion?*

Often, a case will turn on whether the representation was information provided to the consumer, which they relied on to their detriment, or merely someone's personal opinion. This question was considered in the case of *Seafolly Pty Ltd v Madden*.<sup>35</sup> In that case, the Federal Court of Australia had to decide whether comments made by the respondent, Ms Madden, on her Facebook page were misleading and deceptive or merely an expression of the writer's opinion. The court applied existing case law to a social media context and confirmed that an opinion made recklessly could amount to misleading or deceptive conduct.<sup>36</sup>

The respondent, Ms Madden, who was a swimwear designer, made representations on her Facebook page which suggested Seafolly had copied some of her designs. She posted some photos under the heading "The sincerest form of flattery?" implying that Seafolly had copied her designs. She also posted some comments on her White Sands Australia Swimwear Facebook page, which had over 3500 friends. Seafolly denied the allegations and took action against her for misleading and deceptive conduct. The question was whether the language employed by Ms Madden was such that persons viewing her statements would be deceived or misled into believing that Seafolly had copied her designs. She argued that she was merely expressing an opinion about the similarities between her garments and those of Seafolly. The court held that her statements would not have been understood as mere expressions of her opinion, and even if they did, she was reckless in forming them, as she had not made a serious attempt to ascertain the true position.<sup>37</sup>

Consequently, following this judgment, even if comments amount to an expression of the author's opinion, if the comments are false and no genuine effort is made to establish the truth, the court will treat them as misleading or deceptive.

#### **Global initiatives**

In an international context, it should be noted that in October 2015, the ACCC joined a global conglomeration of 34 nations set up to address e-commerce issues faced by consumers, including online scams. The centrepiece

of that campaign is the updated [econsumer.gov](http://econsumer.gov) website, launched by the International Consumer Protection and Enforcement Network (ICPEN) on 14 October 2015.<sup>38</sup>

Under this scheme, participating agencies may accept consumer complaints, investigate cross-border issues and pursue regulatory or enforcement actions. According to data made available on the ICPEN website, the site recorded 2036 consumer complaints from Australia in 2014, which was the second highest number globally, after 8749 complaints from the US. Considering the difference in population numbers — 318.9 million in the US as opposed to 23.13 million in Australia — this may indicate that, either Australian consumers are more vigilant in complaining, or Australians are considerably more dissatisfied with e-commerce transactions.<sup>39</sup> However, on the positive side, the statistics show that, in terms of complaints about businesses in a specific country, Australia ranked lower on the list in sixth place, with only 244 complaints recorded with ICPEN in 2014.<sup>40</sup> Nevertheless, of the top 10 countries listed, Australian businesses ranked higher than those in France, Germany, Canada and Cyprus, which indicates that Australian businesses may need to be more vigilant in preventing unlawful conduct online.<sup>41</sup>

#### **Conclusion: where to from here?**

There is clearly a need for Australian businesses to ensure compliance with the ACL and ACCC guidelines in the digital sphere by monitoring their online presence carefully and by responding to emerging issues proactively rather than reactively. This vigilance includes allocating adequate resources in respect of compliance issues and prioritising staff training on ACL compliance. From a regulatory perspective, it seems likely that more reliance will be placed on "soft" regulation and self-regulation by providers or industry organisations, for example by way of the ACCC social media guidelines.<sup>42</sup> Social media sites such as Facebook and Twitter have a vested interest in managing the content on their site for reliability and accuracy and generally have internal mechanisms to address complaints.<sup>43</sup> Facebook also specifically addresses issues such as "prohibited content" and "restricted content" in its advertising guidelines,<sup>44</sup> breaches of which may result in cancellation of users' advertisements and termination of their accounts. Additionally, social media is an avenue for word-of-mouth sharing of experiences by users — an effective way in which scams and misleading conduct can be prevented. Given the high cost of litigation generally — and more so where cross-jurisdictional or international claims are involved — these internal mechanisms and guidelines are useful resources in protecting consumers against misleading and deceptive conduct.



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## Footnotes

1. Consumer Affairs Australia and New Zealand *Implementation of the Australian Consumer Law: A Report on Progress IV (2013–2014)* (December 2014) 13 [http://consumerlaw.gov.au/files/2015/10/implementation\\_acl\\_report\\_IV.pdf](http://consumerlaw.gov.au/files/2015/10/implementation_acl_report_IV.pdf), citing the findings of PricewaterhouseCoopers and Frost & Sullivan *Australian Online Shopping Market and Digital Insights: An Executive Overview* (July 2012) [www.pwc.com.au/industry/retail-consumer/assets/digital-media-research-jul12.pdf](http://www.pwc.com.au/industry/retail-consumer/assets/digital-media-research-jul12.pdf).
2. Competition and Consumer Act 2010 (Cth), Sch 2.
3. As evidenced by existing case law discussed in this article. Also, see Nikhilesh Dholakia (ed) *Global E-commerce and Online Marketing: Watching the Evolution* Quorum Books 2002 p 115.
4. In this case, LivingSocial agreed to a court enforceable undertaking dated 18 December 2014 available at <http://registers.accc.gov.au/content/index.phtml/itemId/1183806>.
5. Above n 4.
6. *Australian Competition and Consumer Commission (ACCC) v Scoop Pty Ltd* [2014] FCA 820; BC201406258 at [11] (Greenwood J).
7. See Australian Competition and Consumer Commission “Scoop to pay \$1 million for misleading both businesses and consumers” media release MR 305/13 (17 December 2013) [www.accc.gov.au/media-release/scoop-to-pay-1-million-for-misleading-both-businesses-and-consumers](http://www.accc.gov.au/media-release/scoop-to-pay-1-million-for-misleading-both-businesses-and-consumers).
8. *Australian Competition and Consumer Commission (ACCC) v Spreets Pty Ltd* [2015] FCA 382; BC201504430.
9. Above n 8, at [153] (Collier J).
10. *Australian Competition and Consumer Commission v Purple Harmony Plates Pty Ltd* [2001] FCA 1062; BC200104454.
11. Above n 10, at [17] (Goldberg J).
12. Now s 4(1) of the ACL.
13. Above n 10, at [11].
14. Above n 10, at [10].
15. Now ss 18 and 29(1)(g) of the ACL.
16. Above n 10, at [21]–[22].
17. Above n 10, at [20].
18. Above n 10, at [22].
19. Above n 10, at [31].
20. *Australian Competition and Consumer Commission (ACCC) v Homeopathy Plus! Australia Pty Ltd* (2014) 146 ALD 278; [2014] FCA 1412; BC201419409.
21. Although access to one article required membership to the site, “membership was open to any member of the public with access being free of charge”.
22. Above n 20, at [318] (Perry J).
23. Above n 20, at [284].
24. *Google Inc v Australian Competition and Consumer Commission (ACCC)* (2013) 249 CLR 435; (2013) 294 ALR 404; [2013] HCA 1; BC201300295.
25. Above n 24, at [53] (French CJ, Crennan and Kiefel JJ).
26. Above n 24, at [70] (French CJ, Crennan and Kiefel JJ).
27. Above n 24, at [69] (French CJ, Crennan and Kiefel JJ).
28. *Yorke v Lucas* (1985) 158 CLR 661; BC8501069.
29. Above n 28 at 666 (Mason ACJ, Wilson, Deane and Dawson JJ). It should however be noted that the South Australian Supreme Court has recently ruled that Google can be held legally responsible when its search results link to defamatory content on the web: see *Duffy v Google Inc* (2015) 125 SASR 437; [2015] SASC 170; BC201510358, where the elements of defamation were proven and the court found in favour of the plaintiff.
30. *Australian Competition and Consumer Commission (ACCC) v Allergy Pathway Pty Ltd (No 2)* (2011) 192 FCR 34; [2011] FCA 74; BC201100491.
31. *Australian Competition and Consumer Commission (ACCC) v Allergy Pathway Pty Ltd* [2009] FCA 960; BC200907920.
32. Above n 30, at [3] (Finkelstein J).
33. See Australian Competition and Consumer Commission “Social media” available at [www.accc.gov.au/business/advertising-promoting-your-business/social-media#don-t-allow-others-to-make-misleading-claims-in-comments](http://www.accc.gov.au/business/advertising-promoting-your-business/social-media#don-t-allow-others-to-make-misleading-claims-in-comments).
34. Above n 33. For example, a large company with 300 staff would be expected to have sufficient resources to become aware of these types of posts on its website or Facebook page soon after they are posted and to remove them. On the other hand a small company with only 10 staff but with 50,000 Facebook fans will also be expected to devote adequate resources to checking its page for misleading or deceptive posts, considering the number of people who could potentially see the posts.
35. *Seafolly Pty Ltd v Madden* (2012) 297 ALR 337; (2012) 98 IPR 389; [2012] FCA 1346; BC201209325.
36. Above n 35, at [68] (Tracey J).
37. Above n 35.
38. Australian Competition and Consumer Commission “ACCC joins international effort to combat online consumer issues” (October 2015) [www.accc.gov.au/update/accc-joins-international-effort-to-combat-online-consumer-issues](http://www.accc.gov.au/update/accc-joins-international-effort-to-combat-online-consumer-issues).



39. International Consumer Protection and Enforcement Network “Complaint trends” available at [www.econsumer.gov/en/News/ComplaintTrend/3#crnt](http://www.econsumer.gov/en/News/ComplaintTrend/3#crnt).
40. The highest number of complaints was against Chinese companies (3647) and second highest against American companies (3405).
41. F Cantatore and B Marshall “Navigating the Australian Consumer Law in the digital marketplace: hazards for commercial entities” (2016) 23(1) *Competition and Consumer Law Journal* 232.
42. Above n 33.
43. See for example Facebook policies on applicable standards available at [www.facebook.com/communitystandards](http://www.facebook.com/communitystandards).
44. See [www.facebook.com/policies/ads/](http://www.facebook.com/policies/ads/).

# One does not simply make a meme: memes and intellectual property issues

Anna Spies 5 WENTWORTH CHAMBERS

Internet memes are an online viral phenomenon through which ideas, images, videos and other materials are spread rapidly online by internet users, through copying and imitation, with variations from user to user.<sup>1</sup> Generally, memes are created for the purpose of humour and are not commercial. Memes are spread rapidly through social media forums and internet threads such as Reddit and can achieve significant fame of their own.

The most common form of internet meme, which is the focus of this article, is the addition of a caption to a photograph, other artistic work or a still image from a film. In each variation of the meme, a humorous caption on the same underlying image is altered from person to person as the meme spreads. For example, one of the most famous memes is “Grumpy Cat”, a photograph of a cat with a grumpy facial expression, to which internet users add humorous captions. Another famous meme involves a still from the movie *The Lord of the Rings: The Fellowship of the Ring* and alterations of the line spoken by the character Boromir “One does not simply walk into Mordor”.

This article broadly considers legal issues arising from the generation of memes under intellectual property and closely related areas of law, including copyright protection for both the underlying image and for the resulting meme, moral rights, trade marks, misleading and deceptive conduct and passing off. Acknowledging that the content and the context of the meme will determine the particular issues that arise in relation to any given meme, the issues considered by this article are necessarily at a high level.

## Copyright and the parody or satire exception

Copyright is infringed if an act comprised in the copyright (such as reproduction or communication to the public) is done in relation to a substantial part of the copyright material without the authorisation of the copyright owner.<sup>2</sup> Where the underlying work used in a meme is a photograph, the typical meme reproduces the entirety of the photograph. This will clearly be a substantial part. On the other hand, if the image used by meme is a single frame from a film, it might be argued that a single frame is not an “aggregate of visual images”

and therefore not a film,<sup>3</sup> or in the alternative, that it is not a substantial part. By sending or posting a meme online, there may be a “communication to the public”, as the photograph has been electronically transmitted or made available online.<sup>4</sup> Assuming that the owner of copyright has not authorised the use of their photograph or other artistic work in the meme and assuming that the relevant infringing activity occurs in Australia, the owner or exclusive licensee may be entitled to bring an action copyright infringement, unless an exception applies.

Australia does not at present have a broad “fair use” exception, as exists in the US. However, a fair use exception has been recommended by the Australian Law Reform Commission<sup>5</sup> and by the Productivity Commission in its draft report.<sup>6</sup> Therefore at present, the creator of a meme would need to rely on a specific exception, such as a fair dealing exception.

A fair dealing with copyright material is not an infringement of copyright if “it is for the purpose of parody or satire”.<sup>7</sup> In considering whether this exception applies, the first question will be whether a meme is for the purpose of “parody or satire”. The parody or satire exceptions were introduced in 2006, but have not yet been judicially considered. While memes are generally intended to be humorous, this is not sufficient for a meme to constitute a parody or satire. Prior to the introduction of the exceptions, Conti J referred to the Macquarie Dictionary definition to indicate that the essence of parody was imitation and that satire was “ironic, sarcastic, scornful, derisive or ridiculing criticism of vice, folly or abuses, but not by way of an imitation or take-off”.<sup>8</sup> US jurisprudence requires generally that a parody must comment on or criticise the original work.<sup>9</sup> However, it is not certain that the Australian exception would be as limited.<sup>10</sup> It is possible that a meme may be seen as a “satire” if it provides a form of social commentary.

If a meme is for the purpose of parody or satire, the second question will be whether the dealing is “fair”.

Factors that are likely to be relevant to whether a dealing is fair will include the purpose and character of the dealing, the nature of the work being used, the amount of the original work taken and the effect upon the market of the original copyright material.<sup>11</sup> In

relation to the nature of the dealing, it will likely be relevant if the meme has a non-commercial purpose and it may also be relevant if the dealing is seen as “transformative” by adding something new with a further purpose or character.<sup>12</sup> The effect upon the market for the original work will depend upon the nature of the original copyright material and the way in which it is exploited by the copyright owner. However, a meme may not compete in the same market as the underlying copyright material. In relation to the substantiality of the part taken, while it is clearly important to imitate and mimic the original work to be a parody or satire, the reproduction of the entirety of an original work without alteration is likely to weigh against fair dealing.

### Who owns copyright in a meme?

While the work underlying a meme such as a photograph may be protected by copyright, the meme created by the internet user may receive separate copyright protection, provided that the meme that is created is sufficiently original. Originality requires that the work originates with an author from some independent intellectual effort.<sup>13</sup> In *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd*,<sup>14</sup> Bennett J found that generally copyright did not subsist in newspaper headlines, being too insubstantial and too short to qualify for copyright protection as literary works.<sup>15</sup> However, her Honour did not exclude the possibility that copyright may subsist in an individual headline.<sup>16</sup> By analogy, there may not be sufficient originality for copyright to subsist where a small amount of text has been added to an unoriginal image. However, in some circumstances, the skill and effort of the meme creator may be such that the resulting new material is original and not *de minimis*.

### Moral rights

The author of a copyright work has moral rights, including the right to be attributed as the author of a work and the right of integrity of authorship.<sup>17</sup> The moral right of integrity of authorship means the right not to have a work subject to derogatory treatment.<sup>18</sup>

Derogatory treatment in relation to an artistic work includes the doing of anything that is prejudicial to the author’s honour or reputation.<sup>19</sup> Depending on the way in which the meme uses the original work, the meme may be prejudicial to the author’s honour or reputation. Here, it is important to note that the prejudice must be caused to the *author*, not to the person in a photograph that has become the subject of an embarrassing meme. Moral rights may be particularly useful where the meme creates an unfavourable association, such as the case of Pepe the Frog, discussed below. In *Perez v Fernandez*,<sup>20</sup>

the drawing of an association between the artist and a disk jockey (DJ) was found to be damaging to the artist’s reputation and therefore infringed the moral right of integrity of authorship.

### Trade marks, misleading and deceptive conduct and passing off

An image captioning meme may use a still from a well-known film or TV show. As discussed above, the Boromir meme uses a still of the character Boromir from the movie, *The Lord of the Rings: The Fellowship of the Ring*. A meme may also include a trade mark. In this context, it is relevant to consider whether the creation and distribution of such memes may infringe a registered trade mark, be misleading or deceptive conduct or constitute the tort of passing off.

A fundamental difficulty with running a trade mark infringement argument will likely be that the person who has created or distributed the meme may not have used the sign *as a trade mark*. Use as a trade mark requires that the sign be used to distinguish, in the course of trade, the goods or services of the person from those of other traders. As discussed above, memes are usually created by internet users for non-commercial purposes. However, if a person sought to commercialise the meme, such as by selling goods featuring the meme, the trade mark analysis might be different. Provided that the trade mark specification is broad enough to cover the goods sold, goods of the same description or closely related goods, or if the trade mark is a famous trade mark, an action may be possible for trade mark infringement if a trade mark is included in the meme and therefore on the goods that are sold.

A similar distinction is likely to arise under the Australian Consumer Law and the tort of passing off. The generation of a humorous meme for non-commercial purposes online may not be conduct “in trade or commerce”, as is required for conduct to be misleading and deceptive in breach of s 18 of the Australian Consumer Law.<sup>21</sup> In addition, given the common and well-known humorous purpose of memes, the captioning of an image may not make a representation of association or affiliation between the creator of the meme and the subject of the meme or owner of the underlying material. The fame of a meme may mitigate against any deception or confusion of the public. However, the sale of goods featuring a meme may, depending on the context and circumstances, represent that there is an association or affiliation between the seller of the goods and the subject of the meme or owner of the underlying material. Similarly, provided that the subject of the meme has a sufficient reputation, the sale of goods featuring the meme may misrepresent that there is a connection between the goods and the subject of the

meme or owner of the underlying material. If there is damage, this may meet the requirements of the tort of passing off.<sup>22</sup>

### Practical considerations

Some people who have become the subject of a meme enjoy and profit from their 15 minutes of fame, becoming internet celebrities. However, there can be a darker side to memes. For example, in 2012, an “Aboriginal Memes” Facebook group was used to post memes that had captions that were highly offensive to Aboriginal Australians.<sup>23</sup> Pepe the Frog, a cartoon character from a comic book series, became a symbol for white supremacy and associated with the alternative right (alt-right).<sup>24</sup>

One of the main determinants of an appropriate strategy for dealing with a meme will be whether there is any real damage. A meme may provide the subject with an unexpected commercial gain, such as a boost in sales of the underlying work. A popular meme may also be commercialised successfully. The owners of the “Grumpy Cat” have registered trade marks internationally for GRUMPY CAT and run an online store that sells grumpy cat merchandise. It is worth noting that even viral memes that make fun of an individual can be commercialised successfully. For example, Kyle Craven (also known as “Bad Luck Brian”) has become an internet celebrity since an embarrassing photograph from his high school yearbook was used as a viral meme.

If the relevant rights holder decides to take some form of legal action, there are many issues and options to consider. While this article cannot purport to address all relevant issues, the following may arise:

- Which jurisdiction is the relevant jurisdiction and is there a cause of action that can be brought in Australia? While this article has considered memes under Australian law, the internet is inherently global in nature and the relevant actions may not have taken place in Australia.
- Who is the defendant and how might they be identified? Memes are frequently posted anonymously or using pseudonyms.
- Who can bring the action? The owner or exclusive licensee of copyright may not be the person who is the subject of the image or may not be the “author” for moral rights protection.
- If there is a copyright infringement, the copyright owner might consider sending a take-down request pursuant to the relevant “notice and take-down” rules. In particular, under s 512 of the US Digital Millennium Copyright Act 1998, the liability of online service providers for copyright liability is

limited if certain steps are taken, including the removal of hosted content upon receipt of a notice sent by the copyright owner.

- If the meme was posted using an online service, does that service provide any avenues for resolution of the dispute under its terms of use?
- Any person considering taking legal action in relation to an internet meme should carefully consider the reactions of internet users. In particular, there is a potential backlash by internet users against a rights holder who seeks to shut down a meme, as well as potential for an attempt to prevent the use of an image to result in the further promulgation of the meme.

As can be seen from the brief overview provided in this article, the legal issues surrounding the creation and distribution of memes are not straightforward. These issues will require careful consideration on the facts of each matter, both in terms of the legal claims that may be available and the most appropriate commercial strategy for dealing with the meme.



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### Footnotes

1. See for example the definition of “meme” in the Oxford Living Dictionary <https://en.oxforddictionaries.com/definition/meme>.
2. Copyright Act 1968 (Cth), ss 14, 31 and 101.
3. See the definition of “cinematograph film” in Copyright Act, s 10 and see the discussion in *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273; (2004) 205 ALR 1; [2004] HCA 14; BC200400864; and *Commissioner of Taxation v Seven Network Ltd* (2016) 241 FCR 1; (2016) 118 IPR 211; [2016] FCAFC 70; BC201603954. However, this is not a settled issue. See by contrast the UK decision of *Spelling Goldberg Productions v BPC Publishing Ltd* [1981] RPC 283.
4. See the definition of “communicate” in Copyright Act, s 10.
5. Australian Law Reform Commission *Copyright and the Digital Economy* Final Report ALRC Report 122 (November 2013) Recommendation 5–1 [www.alrc.gov.au/sites/default/files/pdfs/publications/final\\_report\\_alrc\\_122\\_2nd\\_december\\_2013\\_.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf).
6. Productivity Commission *Intellectual Property Arrangements: Productivity Commission Draft Report* (April 2016) p 18 [www.pc.gov.au/inquiries/completed/intellectual-property/draft/intellectual-property-draft.pdf](http://www.pc.gov.au/inquiries/completed/intellectual-property/draft/intellectual-property-draft.pdf). While the inquiry report was handed to the Australian Government on 23 September 2016, it has not yet been tabled in parliament or made publicly available.

7. Copyright Act, ss 41A and 103AA.
8. *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235; (2001) 184 ALR 1; [2001] FCA 108; BC200100361 at [17] (Conti J).
9. See *Dr Seuss Enterprises LP v Penguin Books USA Inc* 109 F 3d 1394 (9th Cir, 1997).
10. For a discussion of the question of whether the Australian exception will be limited to those parodies or satires that target the original work, see the author's previous article A Spies "Revering irreverence: a fair dealing exception for both weapon and target parodies" (2011) 34(3) *University of New South Wales Law Journal* 1122.
11. Drawn from the fair dealing factors for research or study set out in s 40 of the Copyright Act and the fair use considerations under US case law *Campbell v Acuff-Rose Music Inc* 510 US 569 (1994). For a discussion of whether memes could assert fair use under the US law, see R Patel "First world problems: a fair use analysis of internet memes" (2013) 20(2) *UCLA Entertainment Law Review* 235.
12. Bennett J in *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 189 FCR 109; (2010) 272 ALR 547; [2010] FCA 984; BC201006524 found (obiter) that the contribution of abstracted articles made the use of the headline "transformative use" by "adding something new, with a further purpose or character", referring to US case law.
13. *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458; (2009) 254 ALR 386; [2009] HCA 14; BC200902942 at [48] (French CJ, Crennan and Kiefel JJ).
14. *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 189 FCR 109; (2010) 272 ALR 547; [2010] FCA 984; BC201006524.
15. Above n 13, at [44].
16. Above n 13, at [50].
17. Copyright Act, ss 193 and 195AI(1).
18. Copyright Act, s 195AI(2).
19. Copyright Act, s 195AK.
20. *Perez v Fernandez* (2012) 260 FLR 1; [2012] FMCA 2; BC201200427 at [87] and [103] (Driver FM).
21. Australian Consumer Law, s 18 (Competition and Consumer Act 2010 (Cth), Sch 2).
22. See for example *Fenty v Arcadia Group Brands Ltd t/as Topshop* [2015] EWCA Civ 3. While not a case dealing with a meme, the England and Wales Court of Appeal found that Topshop had engaged in passing off through selling a t-shirt with an image of Rihanna.
23. See the discussion of this Facebook group and its eventual removal in D Herborn "Racial vilification and social media" (2013) 8(4) *Indigenous Law Bulletin* 16.
24. See O Nuzzi "How Pepe the Frog became a Nazi Trump supporter and alt-right symbol" (26 May 2016) [www.thedailybeast.com/articles/2016/05/26/how-pepe-the-frog-became-a-nazi-trump-supporter-and-alt-right-symbol.html](http://www.thedailybeast.com/articles/2016/05/26/how-pepe-the-frog-became-a-nazi-trump-supporter-and-alt-right-symbol.html).



# What Queensland Government Information Technology Contracting (GITC) users need to know about the new GITC documents

*Kathryn Purcell-Hennessy KING & WOOD MALLESONS*

Queensland GITC Framework version 5.03 is undergoing a major overhaul. In early 2017, the standard documents for doing information and communications technology (ICT) business with Queensland Government will be replaced with new documents. The new contracts and associated guidance materials are significantly different to the framework that has been in place (and largely unchanged) since 2004.

As the comprehensive conditions are only half the length of current GITC, there is a temptation to assume the new document is a simplification of GITC, but that is not the case. There are new concepts and new obligations on suppliers.

Whether you are a supplier or potential supplier to Queensland Government or a procurement officer within Queensland Government, this article considers some of the key changes and developments of which you will need to be aware.

## A brief history of GITC

GITC version 5 was released in 2004. There have been relatively minor changes to the framework since then:

- version 5.02 in approximately 2011 — to accommodate changes to privacy and right to information legislation; and
- version 5.03 in late 2014 — to split the role of accreditation between GITC Services (a central agency within Department of Science, IT and Innovation) and an industry body, QAssure.

Until now, it has been mandatory for Queensland Government agencies subject to the Queensland Procurement Policy to use GITC for ICT procurements.<sup>1</sup> A limited exception was introduced in mid-2015, allowing low-risk, low-value ICT purchases to be made using the general goods and services conditions.

Suppliers must be accredited before they can contract on GITC terms. Potential suppliers must submit an application, pay a small fee, undergo financial checks, and agree minimum insurances. As part of accreditation, the supplier will sign a GITC deed of agreement with

GITC Services, incorporating “head agreement” terms from GITC Pt 1. They may also be required to provide a bank guarantee or parent guarantee, and can try to negotiate pre-agreed changes to the GITC framework through Sch A2(A) of the deed of agreement. Accreditation is renewed annually. Suppliers are accredited for particular types of goods and services.

Most large technology product and service companies operating in Australia are GITC-accredited, with some notable exceptions. The exceptions include Google and the Adobe software licensing entity, although an Adobe professional services company is accredited.

## Status of the review

The GITC review and refresh process started in May 2015, with broad industry and agency consultation. Despite some suggestions that Queensland aim for consistency with other jurisdictions by adopting Procureit as a base for the review, Queensland Government adopted a recommendation to co-design a new framework.

Stage 1 workshops ran between October 2015 and February 2016, culminating in draft contract documents. Stage 2 is ongoing and scheduled to finish in January 2017. In Stage 2, stakeholders are workshoping and refining the draft contract documents and preparing ancillary documents and guidance materials.

Published information indicates that the review process should be substantially complete by the end of 2016 and the new documents available for general use by early 2017.<sup>2</sup> The website has largely not been updated since September and there are unconfirmed rumours that the release date will be extended to mid-2017.

## Multiple document suites

### *New ICT-specific standard documents*

Unlike GITC, which applied to all Queensland Government purchases of ICT goods and services, the proposed decision tool contemplates two suites of Queensland Government-published standard documentation:

- general contract conditions (GCC) — for low-risk contracts up to \$1 million value; and
- comprehensive contract conditions (CCC) — for low-risk contracts over \$1 million value and moderate risk contracts.

The published accreditation module documentation specifies that the GCC will be non-negotiable, but that at least some of the CCC will be negotiable.

The new documents are similar to the Queensland Government's general goods and services templates.<sup>3</sup> They are not based on any interstate or federal ICT contracting frameworks.

For both the GCC and CCC, the supplier and customer will complete and agree a "details" document, which will attach or incorporate the terms by reference.

### But other documents may be used instead

The draft contract type decision tool contemplates that some ICT purchases will be made on terms other than the GITC replacement terms. Specifically:

- supplier terms and conditions — for low-risk contracts up to \$1 million value;
- standing offer and panel arrangements; or
- bespoke contract — for high- and extreme-risk contracts.

### *And the position for standing offer arrangements is unclear*

Published documents do not specify any particular format for standing offer arrangements and panels. It is therefore not clear whether the current suite of ICT standing offer arrangement documents<sup>4</sup> will be withdrawn or updated. If they are not withdrawn, it is not clear whether the legacy GITC terms will continue to apply to standing offer arrangements on the current standard terms.

It is also possible that Queensland Government intends that the standing offer arrangement conditions for general goods and services<sup>5</sup> will equally apply to ICT purchases, or that agencies and suppliers will have the flexibility to draft bespoke standing offer arrangements.

### Accreditation is changing

#### *No possibility of pre-agreed changes*

There will no longer be a "head agreement" with a central contracting authority (the current Pt 1 Contract Authority Provisions).

Suppliers will no longer be able to pre-agree alterations to the framework and have those changes automatically apply to all their contracts that use the framework. That is, the current Sch A2(A) regime is being abolished.

Suppliers will no longer be required to submit a central product, service and price list (the current Sch A3). However, suppliers will be required to submit and periodically update information about themselves through a supplier module in an online portal. The portal will be accessible by customers.

### *One tier of accreditation becoming three*

Suppliers must be accredited to use the GCC or CCC. A tiered accreditation model is being introduced to replace the flat accreditation currently conducted by GITC Services and QAssure. Suppliers will be able to choose their level of accreditation, which will dictate whether they can contract under the GCC or the more detailed CCC.

On the current proposal, there will be three tiers of accreditation:

- level 1 suppliers are not subject to financial assessment (or have failed financial assessment), may only use the GCC, and may only execute contracts up to \$200,000 value;
- level 2 suppliers are subject to financial assessment and may only use the GCC. There is no separate contract value limit; and
- level 3 suppliers are subject to financial assessment, and may use the CCC.

Level 3 suppliers have the option to also apply for level 2 accreditation, giving them the flexibility to use either the GCC or CCC.

### *But accreditation is not required if using the other documents*

The three accreditation levels determine which of the GITC replacement terms a supplier can use. They do not speak as to whether the supplier can contract with Queensland Government on other terms.

The model expressly assumes that suppliers entering standing offer arrangements or bespoke contracts probably will be accredited. Unlike the current GITC model, however, there is no *requirement* that a supplier be accredited to sell ICT goods and services to Queensland Government. This is justified on the bases that:

- accreditation is unnecessary and uncommercial for high-volume, low-risk transactions;
- principals of panel arrangements will conduct their own assessments; and
- there are few bespoke contracts per year.

It will be interesting to see if these assumptions are borne out.

One risk with this approach is that more contracts are entered on these non-standard terms (relative to the GCC and CCC) than anticipated, such that the goal of a

single, useful accreditation model is undermined. This might occur if customers and suppliers are less inclined to “bundle” potentially unrelated goods and services in a single contract, to avoid pushing the contract value over the \$1 million threshold (beyond which supplier terms and conditions cannot be used). It might also occur if customers and suppliers take a more conservative view of risk and use bespoke terms more than expected.

## Terms are less favourable for suppliers

### *Users need to learn two sets of terms*

While the GCC are shorter than the CCC, they are not significantly so. Most of the terms in the CCC have equivalents in the GCC. Many of the terms are identical. However, it is not straightforward to compare the documents because formatting and numbering are different.

The decision to introduce a second set of contract terms will impose additional administrative costs on customers and suppliers. ICT purchasers and sellers will need to become familiar with two different contract frameworks and the differences between them.

Presumably, where Queensland Government has proposed a clause in the CCC without an equivalent in the GCC, that clause is seen as less important and is more likely to be negotiable, even if some of the CCC terms are mandatory. If that is the case, customers and suppliers may try to simplify procurement by electing not to use the GCC. Instead, they may prepare a list of “optional” clauses in the CCC that can be deleted through departures to the CCC. This could result in a contract that has substantively the same effect as the GCC and at the same time avoid the need for education of their procurement and legal staff on the second set of terms.

### *Suppliers asked to agree stricter obligations*

Several of the new terms are stricter than GITC. For example:

- The CCC includes lengthy supplier warranties clause with no equivalents in GITC.
- Liability under the indemnities is unlimited.

### *And to give up rights*

At the same time, some of the suppliers’ rights have been wound back. For example:

- The GCC defaults to a customer-owned model for newly developed intellectual property. If the parties want to specify supplier ownership, they will need to draft an entire licence clause in the details document.

- Both sets of conditions explicitly exclude the supplier’s ability to rely on information and documents provided by the customer. While the supplier must notify the customer if it becomes aware of inaccuracies in supplier information and documents, the customer has no equivalent obligation.
- The supplier’s right to terminate for cause is limited to non-payment. The supplier has no express remedy for breach of confidentiality or intellectual property rights by the customer.

### *And to give up the ability to negotiate*

As mentioned above, Queensland Government anticipates that the GCC will be non-negotiable and that some of the CCC will be non-negotiable, although Queensland Government has not published any guidance on which of the CCC terms will be non-negotiable.

Of course, many of the terms provide a default position that can be altered by agreement to the contrary in the order documents. However, many of the terms do not provide that flexibility, so that the clause could only be overridden by an agreed departure. If the framework does not permit departures, this may lead to unintended consequences. For example:

- Customers and suppliers may prefer not to use the new terms, instead contracting on supplier terms, bespoke terms or panels that will provide this flexibility.
- Some suppliers may choose not to become accredited for the new terms. If they do this, customers will be forced to contract outside of the new framework terms if they want to do business with those suppliers. Whether this is a real risk will depend on whether a significant number of significant suppliers choose not to become accredited.
- Customers and suppliers may choose to contract under the CCC because it allows more flexibility, even when the GCC would have been appropriate. Suppliers may force this option by choosing only to become accredited to level 3 (so that the supplier is not entitled to use the GCC).

## Transition

### *Need to transition to the new framework*

The number and nature of the changes naturally leads to a need for a robust and supportive transition process for GITC users moving to the new framework and terms. Very little information about the transition approach has been published.

At present, Queensland Government anticipates submitting final versions of the GCC and CCC in January 2017, and that (subject to internal Queensland Government approval) the new documents will be communicated from February 2017.

Of course, there are many contracts and panels that utilise GISC. Some of these may not expire for several years after publication of the new documents. There will be a process of transitioning customers and suppliers from legacy GISC contracts to the new formats. There may be a period of time when GISC and the new documents are used side by side, particularly if requests for tenders have been issued based on legacy terms and the contract not yet signed at the time of publication. Some materials on the GISC review website indicate that Queensland Government expects the GCC and CCC will be used for new contracts from the time they are published.

### *Draft approach expected in end of 2016*

Government consultation on a transition approach has been occurring since August 2016. Unlike the new contract documents, this consultation has not involved industry stakeholders.

A final transition approach is expected to be communicated from December 2016. As no drafts have been published, it is not known what the scope of the transition approach will be, such as whether it includes transition of accreditation, attempts to replace current contracts, or education and promotion of the new terms. It is not known how the Queensland Government proposes to transition.

### *But the position for standing offer arrangements is unclear*

It is also unknown whether the transition approach applies to standing offer arrangements.

### **Take away messages**

Although Queensland Government is still in consultation about several aspects of the GISC replacement and there may be further changes, it is clear that the proposed changes to GISC are both extensive and divergent from equivalent contracting terms in other Australian jurisdictions. If the current draft GCC and CCC are substantially adopted, there are some significant issues that will need to be resolved, including:

- clarifying whether there is an ongoing role for the ICT standing offer arrangements based on GISC, and what that will be;
- whether there is sufficient incentive for current GISC suppliers to contract on the new terms, given that the GCC and CCC are less favourable to suppliers in several aspects and may not be negotiable, combined with approval to contract on supplier terms in some instances; and
- how and when existing contracts will be transitioned to the new terms.

GISC users will need to educate their procurement and legal teams about the changes and should not assume equivalence with other ICT contracting frameworks they may be familiar with. Government GISC users should consider whether changes to procurement policies will be required to accommodate the new framework. It may be possible to start working on necessary policy changes prior to publication of the final framework documents. Even if not, procurement professionals should be considering the impact of the changes as part of any requests for tenders they issue or respond to, over the next few months.



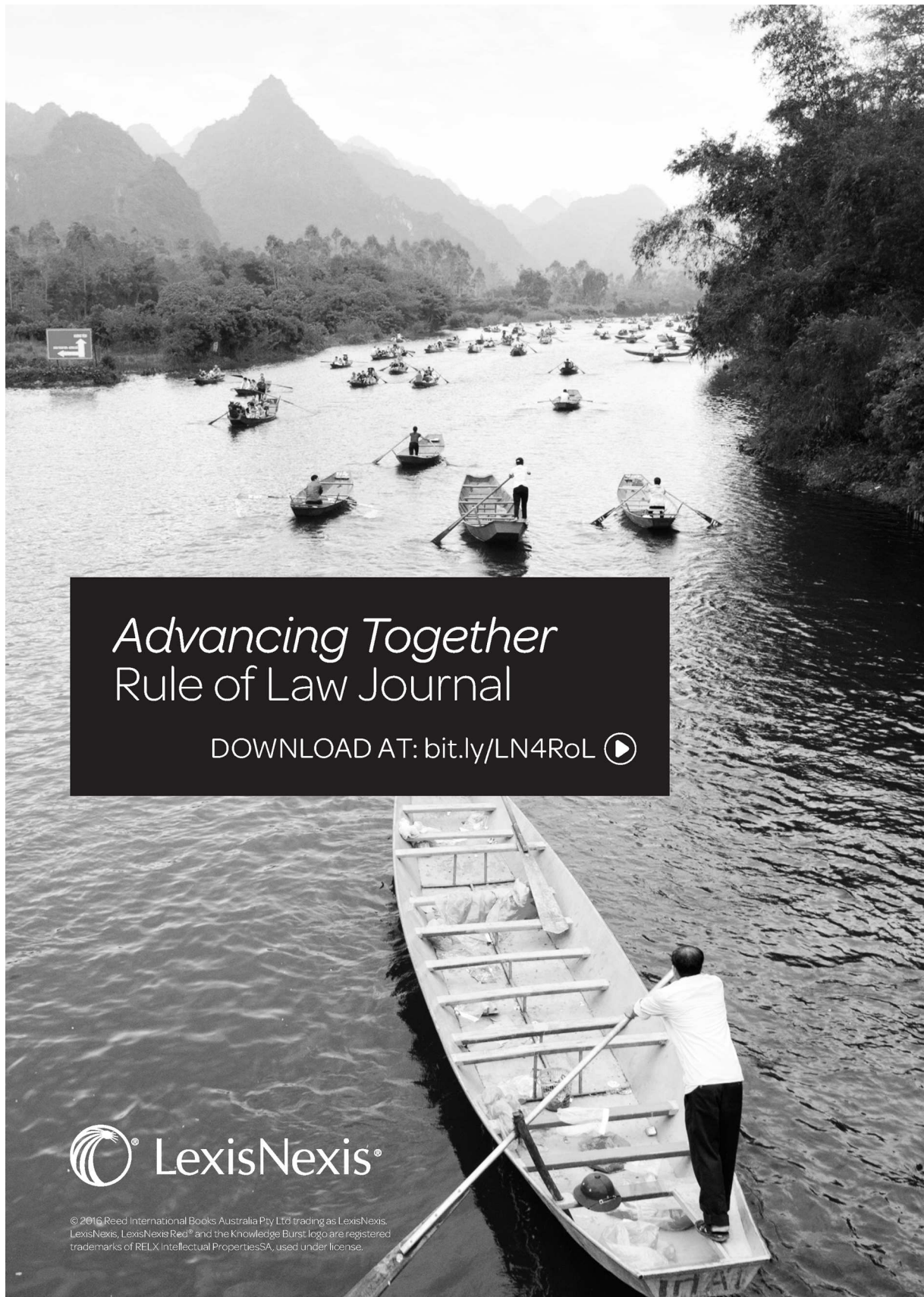
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### **Footnotes**


1. Queensland Government "ICT — templates" (15 October 2015) [www.qld.gov.au/gov/ict-templates-standing-offer-arrangements](http://www.qld.gov.au/gov/ict-templates-standing-offer-arrangements).
2. Queensland Government "Be part of it" (28 June 2016) [www.qld.gov.au/dsiti/gov-ict/buying-selling-ict/gitc-review/be-part-of-it/](http://www.qld.gov.au/dsiti/gov-ict/buying-selling-ict/gitc-review/be-part-of-it/).
3. Queensland Government "General goods and services — templates" (28 October 2016) [www.qld.gov.au/gov/general-goods-and-services-templates](http://www.qld.gov.au/gov/general-goods-and-services-templates).
4. Above n 1.
5. Above n 3.





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# Driverless road vehicles in Australia — Part 1 — National Transport Commission discussion paper

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After beginning work in this area in 2015, on 10 May 2016, the Australian independent statutory body for transport, the National Transport Commission (NTC), released a discussion paper *Regulatory Options for Automated Vehicles*<sup>1</sup> (Discussion Paper).

Three days earlier, on 7 May 2016, the first reported road accident fatality in a Tesla Model S while the Tesla autopilot was activated occurred in Williston, Florida in the US.<sup>2</sup> The US National Transportation Safety Board's investigation into this accident is currently in its initial stages having released its preliminary report on 26 July 2016, which will be supplemented or corrected during the course of the investigation.<sup>3</sup>

In the accompanying media release to the NTC's Discussion Paper, it was stated that: "Australia's laws are not ready for driverless vehicles ... Australia's laws need to be ready for the biggest change to our transport system since cars replaced horses."<sup>4</sup>

The NTC conducted an extensive legislative audit covering two conventions, 32 Acts and 21 Regulations governing Australian road, vehicle design and safety laws and Regulations for all states and territories. The NTC identified 716 specific provisions which are relevant to automated vehicles and in particular, issues or regulatory barriers for automated vehicles that do not have a human driver (or where the human driver is not always in control).<sup>5</sup>

The NTC noted that "the Australian Government has responsibility for design rules for new vehicles, but state and territory governments have jurisdiction over in-service vehicle standards, road rules, enforcement, registration and licensing".<sup>6</sup> The risk of inconsistencies within this already complex framework appears to be a pervading consideration for future work of the NTC in seeking to remove unnecessary regulatory barriers to automated vehicles on Australian roads.<sup>7</sup>

A detailed discussion of all issues raised in the Discussion Paper is beyond the scope of this series of two articles.

This first article in this series provides an overview of key issues covered in the Discussion Paper, while the second article focuses on some of these key issues in further detail.

## Overview of the Discussion Paper

Broadly, the key issues in the Discussion Paper are:

- supporting on-road trials of automated vehicles in the various states and territories (Ch 4);
- clarification required for the definitions of "control" and "proper control" of a vehicle and of the meaning of "driver" (Chs 5 and 7);
- issues with the application of safety assurance and driver licensing standards to the automated function of a vehicle (Ch 6);
- apportioning responsibility for a vehicle between the human driver and automated system at a point in time (Ch 8);
- vehicle design and standards (Ch 9);
- oversight of vehicle modification and in-service compliance (eg, standard licensed repair versus "backyard" modifications) (Ch 10);
- liability (Ch 11); and
- privacy (Ch 12).

The NTC also stated that:

... there are unlikely to be regulatory barriers to the introduction of more automated trains in Australia because the rail sector has adopted an accreditation model based on operators satisfying the relevant regulator that they have the competency and capacity to manage the identified risks,<sup>8</sup>

and the Discussion Paper therefore does not cover automated rail vehicles in any further detail.

## Indications of the NTC's support

The NTC has indicated its support for the development of national guidelines in relation to on-road trials and the changing meanings of control and proper control, as opposed to making no changes or making legislative or regulatory changes.<sup>9</sup>

A new national safety assurance framework is supported for automated vehicles but no new vehicle design standards are proposed until international standards are released (given this may be “primarily an import-based market”<sup>10</sup>).

The current approaches for privacy, road rule enforcement and liability are recommended to remain with governments supporting industry guidance and education in regard to liability and vehicle modification standards and to otherwise wait until the risks in regard to privacy are better understood.<sup>11</sup>

Legislative change is recommended to expand the meaning of “driver” to include an automated driving system and ensure that a legal entity must be responsible for an automated driving system.<sup>12</sup>

### Supporting on-road trials — Ch 4

A necessary first step to understanding the practical issues for implementation of automated road vehicles on Australian roads will be on-road trials. The legal changes that have been occurring and that are in development to allow for on-road trials of certain automated vehicles, particularly in SA, are noted in the Discussion Paper and have already received recent analysis and therefore will not be covered further in this series of articles.<sup>13</sup>

### Changing meanings of “control”, “proper control” and “driver” — Chs 5 and 7

The NTC highlighted the issue for the current definition of a driver, being human, where, “instead of a human, the automated driving system is the driver, ... however, such a system is a computer and cannot be a legal entity”,<sup>14</sup> and this constitutes a gap in the Regulations that will need to be resolved.

The NTC notes that “the principle that the driver is in control of the vehicle”, derived from the 1968 Vienna Convention on Road Traffic, affects many elements of the Australian Road Rules. Control is not defined.<sup>15</sup>

The NTC also refers to Australian Road Rules requiring a driver to maintain proper control of the vehicle being driven (ie, for road safety purposes).<sup>16</sup> The NTC states that proper control is currently interpreted as having at least one hand on the steering wheel, which the NTC acknowledges is likely to become outdated with the introduction of automated vehicles.<sup>17</sup>

The question of proper control may change from maintaining control of the movement and propulsion of the vehicle with at least one hand on the steering wheel at all times to “being fully alert, being ready to take over from the automated driving system, being trained in monitoring, and being in the driver’s seat”.<sup>18</sup>

The issues for the changing meanings of driver, control and proper control will be discussed in further detail in the second article in this series.

### Safety assurance — Ch 6

The NTC notes that “automated vehicles could significantly improve road safety outcomes by preventing crashes and reducing deaths and serious injuries”.<sup>19</sup>

The NTC recognises that:

... the technology supporting automated vehicles ... in many cases is still being developed, tested and trialled [and that] the direction of vehicle standards and road rules at an international level is also still evolving.<sup>20</sup>

As part of this evolution, automated vehicle safety, and most particularly the ability of computers and robots to make ethical and moral decisions (or be pre-programmed with ethical and moral rules) appears to be a most significant potential barrier to overcome before any widespread uptake of automated vehicles onto public roads.

One recent survey found that while:

... 76% of participants thought that it would be more moral for [automated vehicles] to sacrifice one passenger [inside the vehicle] rather than ... 10 pedestrians [outside the vehicle,] ... [a utilitarian approach] ... Respondents indicated a significantly lower likelihood of buying the [automated vehicles] when they imagined the situation in which they and their family member would be sacrificed for the greater good.<sup>21</sup>

This aspect of the Discussion Paper will be discussed in further detail in the second article in this series.

### Point in time responsibility — Ch 8

The NTC identifies that under the current legal framework, there must always be an entity responsible for a vehicle, “even if that entity (or “person” in the legal sense) switches between a human driver and the automated driving system entity throughout a journey”.<sup>22</sup>

In part to assist to “make sense of different applications of automated driving” (ie, conceptualise and separate different levels of human responsibility for a vehicle against responsibility of a computer), the NTC adopted the SAE International Standard J3016 Levels of Driving Automation that categorises levels of vehicle automation from no automation, to partial automation to full automation.<sup>23</sup>

The NTC identified that, for any level of automation that falls within the partial automation category, the human driver will remain responsible because:

... given that, by definition, a human driver remains in control of a partially automated vehicle. Likewise, identifying who is in control will not be an issue for vehicles that are conditionally automated if agreement is reached that a human driver remains in control when required to monitor the vehicle.<sup>24</sup>

This issue will be discussed in further detail in the second article in this series.

## Vehicle design and standards — Ch 9

The NTC acknowledged that vehicles with no need for human drivers (eg, only passengers or freight) may not need certain components currently required under Australian vehicle design standards (eg, “such as a steering wheel, control panels, mirrors and brake pedals”<sup>25</sup>).

Australian Design Rules (ADRs) are national vehicle standards applied to most vehicles imported or manufactured in Australia. The ADRs broadly cover issues such as, “vehicle structure, lighting, noise, engine exhaust emissions, anti-theft controls and braking”.<sup>26</sup> An ADR is a safety standard within the meaning of the Australian Consumer Law.

The NTC identified 16 current ADRs constructed around a human driver that may need to change.<sup>27</sup> The NTC also identified a number of new areas for ADRs to cover including sufficient protection from cyber attacks, safe wireless communications between vehicles and demonstrating that an automated vehicle can drive in automated mode in compliance with Australian Road Rules, the latter of which may require multiple sets of standards to be complied with unless road rules are harmonised between states and territories.<sup>28</sup>

This issue will be discussed in further detail in the second article in this series.

## Vehicle modification and in-service compliance — Ch 10

The NTC notes that “state and territory road agencies currently rely on a mix of self-regulation and roadside enforcement to ensure compliance with vehicle standards”. Currently, there is “no formal industry or government oversight of non-tangible modifications by manufacturers, such as software updates that could significantly modify vehicle performance”.<sup>29</sup>

Issues that may arise for automated vehicles in regard to software modification including hacking, managing and anticipating customer misuse, “backyard modification”, and particularly where “vehicles become more reliant on sensor information”, were noted in the Discussion Paper.<sup>30</sup>

The NTC stated that “additional [regulatory] oversight, or compliance enforcement, of in-service vehicle standards may be ... reasonable if the impact of unregulated automated vehicle modification poses an unacceptable safety risk to the community”.<sup>31</sup>

The NTC also stated that “further understanding the potential risks that could arise from vehicle modifications, or from vehicles becoming non-compliant while in-service, is required to justify additional regulatory

oversight” and it supported industry development of vehicle modification standards that “could take the form of guidelines or an expansion of the current industry repair code”.<sup>32</sup>

## Liability — Ch 11

The NTC indicates in this chapter that the question of road accident liability (ie, between each vehicle involved in an accident) is well-established, but assigning fault (ie, between the driver and the vehicle manufacturer) could be more complex.<sup>33</sup>

The NTC also anticipates that:

More parties could be responsible for a crash, including government and private road managers if automated vehicles become dependent on road infrastructure to operate safely. For example, because the automated vehicle relies on accurate speed data, road signage or line marking.<sup>34</sup>

The outcome of the investigation into the recent fatal accident in the US may attribute some liability to car manufacturer Tesla.<sup>35</sup> The outcome of this matter could also affect whether manufacturers become excessively cautious.<sup>36</sup>

The Discussion Paper avoids seeking “to resolve all liability complexities, but [rather addresses another need] to identify the roles of government and industry to address them”,<sup>37</sup> and the NTC supports the introduction of industry guidance, which could anticipate resolutions for liability complexities once automated vehicles are introduced.

## Privacy — Ch 12

The NTC states in the Discussion Paper:

Automated vehicles have the potential to generate significant amounts of location information that could be personal information. ... Personal information generated by automated vehicles could also be much broader than location information. It could include data attributes such as time, seat occupancy, vehicle speed, and phone call and social media use.<sup>38</sup>

The NTC identifies a number of legitimate and illegitimate purposes for the use of personal information generated by automated vehicles from sharing of personal information for certain safety, criminal investigation, public policy or enforcement purposes to the selling of personal information for marketing and advertising purposes, enforcement agencies “fishing” for speed offences and to identify parking offences and vehicle owners being able to track the movements of the previous owner of an automated vehicle.<sup>39</sup>

Ultimately, the NTC states that as a first step:

In 2016, Austroads is commissioning a privacy impact assessment to determine whether the [two main data messages likely to be used, being the] [Cooperative Awareness Message (CAM)<sup>40</sup>] and [Decentralised Event Notification Message (DENM),<sup>41</sup>] should be considered personal information, and to recommend actions to address any identified privacy issues.<sup>42</sup>

The NTC anticipates the outcomes of this assessment to be released mid-2016 but states that the current application of privacy and surveillance laws should be sufficient “until the privacy risks are better known”.<sup>43</sup>

## Conclusion

As stated in the NTC’s media release, “amending these laws shouldn’t be hard”,<sup>44</sup> but harmonising the complex web of laws and Regulations and potential inconsistencies between the states and territories may be a complex task.

The consultation period for the NTC Discussion Paper closed on 11 July 2016,<sup>45</sup> and following the NTC’s preparation of reform recommendations for the Transport and Infrastructure Council meeting in November 2016, a further discussion paper was published by the NTC in November 2016 broadly in regard to the Transport and Infrastructure Council’s request to the NTC to develop guidelines on automated vehicle trials to ensure a level of consistency in trial conditions across Australian states and territories, while maintaining flexibility.<sup>46</sup> The consultation period on the further discussion paper concludes on 16 January 2017.



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## Footnotes

1. NTC *Regulatory Options for Automated Vehicles* Discussion Paper (2016) 6–7 [www.ntc.gov.au/Media/Reports/\(049B1ED1-5761-44D5-9E3C-814A9195285D\).pdf](http://www.ntc.gov.au/Media/Reports/(049B1ED1-5761-44D5-9E3C-814A9195285D).pdf). This followed an issues paper: NTC *Regulatory Barriers to More Automated Road and Rail Vehicles* Issues Paper (February 2016). Among its other functions as an intergovernmental agency, the NTC “develops and submits reform recommendations for approval to the Transport and Infrastructure Council, which comprises Commonwealth, state and territory transport, infrastructure and planning ministers” in relation to improving vehicle productivity, safety and environmental performance for rail and intermodal transport systems: see Discussion Paper above.
2. See F Lambert “Understanding the fatal Tesla accident on Autopilot and the NHTSA probe” (1 July 2016) <https://electrek.co/2016/07/01/understanding-fatal-tesla-accident-autopilot-nhtsa-probe/>.
3. See National Transportation Safety Board “NTSB issues preliminary report for Williston, Florida, highway crash” media release (26 July 2016) [www.nts.gov/news/press-releases/Pages/pr20160726.aspx](http://www.nts.gov/news/press-releases/Pages/pr20160726.aspx).
4. NTC “Australia’s laws are not ready for driverless vehicles” (10 May 2016) [www.ntc.gov.au/about-ntc/news/media-releases/australia-s-laws-are-not-ready-for-driverless-vehicles/](http://www.ntc.gov.au/about-ntc/news/media-releases/australia-s-laws-are-not-ready-for-driverless-vehicles/).
5. Discussion Paper, above n 1, at 2.
6. Discussion Paper, above n 1, at 7.
7. Discussion Paper, above n 1, at 7.
8. Discussion Paper, above n 1, at 8.
9. Discussion Paper, above n 1, at 15.
10. Discussion Paper, above n 1, at 7.
11. Discussion Paper, above n 1, at 16–18.
12. Discussion Paper, above n 1, at 16.
13. See A Lazarus “New laws for trials of driverless motor vehicles in Australia” (2016) 19(5–6) *INTLB* 374.
14. Discussion Paper, above n 1, at 67.
15. Discussion Paper, above n 1, at 47.
16. Discussion Paper, above n 1, at 47.
17. Discussion Paper, above n 1, at 45.
18. Discussion Paper, above n 1, at 49.
19. Discussion Paper, above n 1, at 7.
20. Discussion Paper, above n 1, at 56.
21. See E Ackerman “People want driverless cars with utilitarian ethics, unless they’re a passenger” (23 June 2016) <http://spectrum.ieee.org/cars-that-think/transportation/self-driving/people-want-driverless-cars-with-utilitarian-ethics-unless-theyre-a-passenger>, citing J Bonnefon, A Shariff and I Rahwan “The social dilemma of autonomous vehicles” (2016) 352(6293) *Science* 1573.
22. Discussion Paper, above n 1, at 75.
23. Discussion Paper, above n 1, at 30–31.
24. Discussion Paper, above n 1, at 75.
25. Discussion Paper, above n 1, at 81.
26. Discussion Paper, above n 1, at 81.
27. Discussion Paper, above n 1, at 82.
28. Discussion Paper, above n 1, at 85–86.
29. Discussion Paper, above n 1, at 90.
30. Discussion Paper, above n 1, at 89 and 91.
31. Discussion Paper, above n 1, at 89.
32. Discussion Paper, above n 1, at 93 and 94.
33. Discussion Paper, above n 1, at 96.
34. Discussion Paper, above n 1, at 96.
35. See M Martinez and M Wayland “Experts: Tesla could be liable in fatal autopilot crash” (1 July 2016) [www.detroitnews.com/story/business/autos/2016/07/01/experts-tesla-liable-fatal-autopilot-crash/86627268/](http://www.detroitnews.com/story/business/autos/2016/07/01/experts-tesla-liable-fatal-autopilot-crash/86627268/).
36. Discussion Paper, above n 1, at 95.
37. Discussion Paper, above n 1, at 95.
38. Discussion Paper, above n 1, at 107.
39. Discussion Paper, above n 1, at 107.
40. Discussion Paper, above n 1, at 108. See Discussion Paper, above n 1, at 109:  
... which is near-continuously broadcasted by a C-ITS device, at up to 10 times per second. All C-ITS devices that

are within range can receive a CAM. For vehicles, the CAM contains data attributes such as vehicle location and speed.

See Discussion Paper, above n 1, at 23:

Cooperative Intelligent Transport Systems (or C-ITS) means the use of wireless communications to exchange data between vehicles, and with roadside infrastructure, including data on vehicle movements, traffic signs and road conditions.

41. Discussion Paper, above n 1, at 115. “Generated when an event occurs and contains information about the event. This could include traffic conditions, road hazards, road works, or a traffic signal violation warning.” See Discussion Paper, above n 1, at 109.

42. Discussion Paper, above n 1, at 109.

43. Discussion Paper, above n 1, at 115.

44. Above n 4.

45. NTC “Preparing for more automated road and rail vehicles” (22 November 2016) [www.ntc.gov.au/current-projects/preparing-for-more-automated-road-and-rail-vehicles/](http://www.ntc.gov.au/current-projects/preparing-for-more-automated-road-and-rail-vehicles/).

46. Discussion Paper, above n 1, at 7 (ie, the Transport and Infrastructure Council comprises of Commonwealth, state and territory transport, infrastructure and planning ministers); and NTC *National Guidelines for Automated Vehicle Trials* Discussion Paper (November 2016) [www.ntc.gov.au/Media/Reports/\(FEAAC3B0-8F38-2C35-5FBC-4968034E6565\).pdf](http://www.ntc.gov.au/Media/Reports/(FEAAC3B0-8F38-2C35-5FBC-4968034E6565).pdf).



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